United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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74-2361

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
JAMES W. ROGERS,

Petitioner-Appellant,

-against-

J. EDWIN LaVALLEE, Warden,
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.

----------X

PETITION FOR REHEARING
EN BANC.

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UNITED STATES COURT OF APPEALS
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-against-

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Respondent-Appellee.

Docket No. 74-2361

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PETITION FOR REHEARING

Preliminary Statement

This is a petition of, by, and for respondent J. Edwin LaVallee, Superintendent of Clinton Correctional Facility, Dannemora, New York for a rehearing en banc from a judgment of this Court, dated May 15, 1975, which granted petitioner's application for a writ of habeas corpus.* United States ex rel. James W. Rogers v. LaVallee, ____ F. 2d ____, Slip. 3549 (Oakes, C.J. and Bartels, D.J.; Lumbard, C.J., dissenting). Respondent petitions this Court because the majority decision of the panel is inconsistent with prior decisions of this Court and because the public interest in review of the decision is especially important since it results in petitioner's release from state custody, with no option of a retrial.

*To conform with usual nomenclature, the inmate will be referred to as the petitioner and the Superintendent will be referred to as the respondent.

Statement of the Case

A. Facts

In 1969 petitioner was indicted by a Kings County grand jury in connection with the abduction, sexual abuse, and death of an eighteen month old girl. The portions of the indictment at issue here charged him with two counts of kidnapping in the first degree. Count three charged him, under N.Y. Penal Law 135.25(2)(a), with abduction plus restraint for more than twelve hours with intent to physically injure or sexually abuse [hereinafter abduction plus sexual abuse]. Count four charged him, under N.Y. Penal Law 135.25(3), with abduction when the victim dies during the abduction or before his return to safety [hereinafter abduction plus death].*

After several weeks of testimony, the jury was charged. The trial court instructed that the jurors could consider petitioner's guilt of kidnapping in the second degree, simple abduction (N.Y. Penal Law § 135.20), under both counts of kidnapping in the first degree. That is, the Court charged on count three, abduction plus sexual abuse, and then stated that the jury could consider simple abduction if they found petitioner innocent of the primary charge. The Court then charged on count four, abduction plus death, and again instructed that simple abduction should be considered if the jury found petitioner innocent of the

*The first two counts charged felony murder and intentional murder. Petitioner was acquitted of these charges and they are not at issue herein.

main charge. At no point during the charge did petitioner's counsel raise any objection; when asked if there were any objections or requests, he replied no.

The jury deliberated for the rest of the day and resumed deliberations the next morning. Obviously confused by the charge, the jury twice requested that the Court explain the two degrees of kidnapping. The jury returned with a verdict of acquittal on the first two counts and on the third count as to both first and second degree kidnapping (abduction plus sexual abuse and simple abduction).

The jury also announced that it was deadlocked as to first and second degree kidnapping (abduction plus death and simple abduction) under the fourth count. Pursuant to the Court's direction they returned for further deliberations and they again returned deadlocked. The judge then found that they did not agree, discharged the jury, and restored the fourth count of the indictment to the trial calendar. Petitioner's counsel raised no objection to the discharge or to the restoration of the fourth count.

Petitioner later moved in the Appellate Division to prohibit his retrial on the fourth count on double jeopardy grounds. The motion was denied and again denied at the retrial. Petitioner was retried on the fourth count (abduction plus death) and found guilty of kidnapping in the first degree after a trial by jury in the Supreme Court, County of Kings. He was sentenced

to twenty years to life imprisonment on July 14, 1970. The judgment of conviction was affirmed without opinion (36 A D 2d 1024 [2d Dept. 1971]); leave to appeal to the Court of Appeals was denied; and certiorari was denied. 405 U.S. 956 (1972). Petitioner is confined pursuant to this conviction.

B. Prior Proceedings

Petitioner then applied to the federal court for a writ of habeas corpus claiming that his second trial was prohibited because 1) he was acquitted of second degree kidnapping (simple abduction) under count three at his first trial and thus could not later be tried for kidnapping on the first degree (abduction plus death) since abduction was a necessary element resolved in his favor and 2) that a mistrial was improperly declared at his first trial.*

Petitioner's first federal habeas corpus petition was denied by the United States District Court for the Northern District of New York (Port, J.) on August 31, 1971. On appeal this Court ordered the petition dismissed for failure to exhaust. United States ex rel. Rogers v. LaVallee, 463 F. 2d 185 (2d Cir. 1972)(Leventhal, Feinberg and Timbers, C.J.J.). At that time this Court stated that the "crime involved is so repulsive, the issue of state-federal relationship so delicate, and the double jeopardy claim so unusual and not without difficulty" (id. at 187) that exhaustion would be required.

*This second claim was rejected by the District Court and raised on appeal but was not decided in light of this Court's resolution of his first claim.

After exhausting his claim in the state courts, petitioner re-presented his two claims to the District Court, which again denied his application. The present appeal was taken from that order.

C. Second Circuit Opinion

In a 2-1 opinion dated May 15, 1975, this Court reversed the District Court and granted the petition. Judge Oakes held it was clear that the jury acquitted petitioner of simple abduction under count three, despite its deadlock on simple abduction and abduction plus death under count four. Having focused on the verdict under the third count only, the Court rejected the District Court's holding that the verdict must be viewed as a whole and that there could be no finding that the jury necessarily acquitted petitioner of simple abduction. The Court also stated that even erroneous trial court action which results in a verdict of acquittal constitutes double jeopardy. Accordingly, the Court held that the State was collaterally estopped from retrying petitioner for a crime which included the element of simple abduction and granted the petition.

POINT I

THE DECISION OF THE PANEL WHICH DECIDED THIS CASE IS INCONSISTENT WITH PRIOR RULINGS OF THIS COURT WHICH HOLD THAT A DEFENDANT WHO CLAIMS THAT A SECOND PROSECUTION IS BARRED BY AN EARLIER VERDICT HAS THE BURDEN OF SHOWING THAT THE PRIOR VERDICT NECESSARILY DECIDED THE ISSUE RAISED BY THE SECOND PROSECUTION

In Ashe v. Swenson, 397 U.S. 436 (1970), the Supreme Court held that the principle of collateral estoppel, that is,

that an issue of ultimate fact once determined by a valid and final judgment cannot be relitigated in a future lawsuit, is embodied in the Fifth Amendment guarentee against double jeopardy and hence applicable to the states. This Court has specifically and consistently held that a defendant claiming the benefit of this rule has the burden "to show that the jury" verdict in the prior trial necessarily decided the issues raised in the second prosecution."* United States v. Gugliaro, 501 F. 2d U.S. 68, 70 (2d Cir. 1974)(original emphasis); United States v. Tramunti, 500 F. 2d 1334, 1346 (2d Cir. 1974) cert. den. ____ U.S. ____, 43 U.S.L.W. 3349 (December 16, 1974); United States v. Feinberg, 383 F. 2s 60, 71 (2d Cir. 1967). See also Sealfon v. United States, 332 U.S. 575, 580 (1948). The majority decision failed to apply this rule to the instant case.

Under the particular facts of this case, there can be no finding that petitioner met his burden of showing that the verdict at the first trial necessarily decided the issue of simple abduction. See Judge Lumbard's dissent, Slip Opin. at 3558-3563. Indeed, since the jury expressly disagreed on two occasions on the issue of first degree kidnapping (abduction plus death), as well as on simple abduction itself, it is manifest that they never acquitted petitioner of simple abduction, although they disposed of the issue of sexual abuse under count three.

*This Court has called this a "most difficult burden" (United States v. Gugliaro, supra at 70); since it is usually impossible to determine on what basis a jury rendered a general verdict, it is the rare situation when the collateral estoppel defense will be available. United States v. Gugliaro, supra at 70; United States v. Tramunti, supra at 1346.

In examining the prior verdict to determine what was decided, the Court must examine the entire record of the trial court and decide if a "rational jury" could have based its verdict on an issue other than the one a defendant seeks to foreclose from further consideration. Ashe v. Swenson, supra, at 444; United States v. Gugliaro, supra, at 71. As the state court, the District Court, and Judge Lumbard all stated, a determination of what was decided at petitioner's first trial can only be assessed by examination of the verdict as a whole. The fatal flaw in petitioner's claim and the majority decision is that they focus on the not guilty verdicts under count three, disregarding the action of the jury on count four.

At the time that the jury announced its verdict of not guilty under count three (abduction plus sexual abuse and simple abduction), it also announced in the same breath that it could not agree if petitioner was guilty or innocent of abduction plus death or simple abduction under count four. The jury even returned for further deliberations on count four and again returned deadlocked. "There is no way in which it can be said in these circumstances that the jury determined that Rogers had not committed even simple abduction." Judge Lumbard's dissent, Slip Opin. at 3562. The judge specifically charged that the jury should consider simple abduction under count three before proceeding to count four. The correctness of the instruction is not before this Court, especially in the absence of any objection to it. The jury did exactly as it was told, and it is clear that their verdict under count three was not an acquittal on the issue

of simple abduction but of the other elements of the primary charge (restraint for more than twelve hours with intent to injury or sexually abuse).

Mindful that the inquiry into the prior verdict "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings' (Sealfon v. United States, supra at 579)*, the state court, the District Court and the dissent all reasoned that the jury could have returned a verdict of not guilty on count three without resolving the issue of simple abduction. Examining the charge to the jury as well as its actions, it is possible, as Judge Lumbard suggested, that the jury misunderstood simple abduction as charged under count three, reading into it an element of the primary charge, the time element (twelve hours) or the requirement of intent to injury or sexually abuse; alternatively, the jury may have thought one of the two charges on simple abduction surplusage, and did not intend by an acquittal on count three to preclude consideration of simple abduction under count four (Slip Opin. at 3559-3560). As the District Court suggested, the jury may have read the time element of twelve hours into simple abduction under count three, while reading the same charge under count four as having no time restrictions.

*"... the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book but with realism and rationality." Ashe v. Swenson, supra, at 444.

While mindful of the dangers involved in "conjecture as to the jury's mental gymnastics" (United States v. Zane, 495 F. 2d 683, 691 [2d Cir.] cert. den. ____ U.S. ____, 95 S. Ct. 174 [1974]), a certain amount of reasoned speculation is necessarily involved whenever a court is called upon to determine what issue was necessarily decided by a prior verdict. See, e.g., Turner v. Arkansas, 407 U.S. 366 (1972); Ashe v. Swenson, supra, at 444-45; United States v. Gugliaro, supra, at 70-71; United States v. Tramunti, supra, at 1346-49; Adams v. United States, 287 F. 2d 701 (5th Cir. 1951). See also Johnson v. Estelle, 506 F. 2d 347, 352 (5th Cir. 1975).

Under the circumstances of this case, "[t]o say that the jury ... acquitted [petitioner of simple abduction] would be pure speculation."* When in one breath the jury announces a verdict of not guilty and deadlock on the same charge and resumes deliberations, the reasoning of the District Court and dissent that the issue was not decided is certainly no more speculative than the majority's holding that the jury clearly acquitted. Petitioner manifestly failed to meet his burden of showing that the issue of simple abduction was necessarily decided in his favor at his first trial.

*United States ex rel. Jackson v. Follette, 462 F. 2d 1041, 1052 (2d Cir.) (Mansfield, J., concurring), cert. den. 409 U.S. 1045 (1972).

POINT II

OTHER CONSIDERATIONS WHICH WOULD WARRANT A REHEARING EN BANC

Unlike the usual habeas corpus situation, the decision in this case necessarily results in petitioner's absolute release from state custody, with no possibility of retrial. The public's interest in sustaining this conviction is the protection of society from a man found guilty by a jury of a serious and shocking crime.

In applying the double jeopardy clause to any particular case, considerations of fairness to the public must be weighed against the defendant's interests. Rigid application of the double jeopardy clause would frustrate "the purpose of law to protect society from those guilty of crimes." Wade v. Hunter, 336 U.S. 684, 689 (1949). Sometimes the interest of defendants must yield to the interest of the public. Illinois v. Sommerville, 410 U.S. 458, 470 (1973); Wade v. Hunter, supra, at 688-90; United States v. Jenkins, 490 F. 2d 868, 884 (2d Cir. 1973)(Lumbard, J. dissenting), affd. ____ U.S. ____, 43 U.S.L.W. 4309 (February 25, 1975).

Quoting from the Supreme Court's recent opinion in United States v. Jenkins, supra, 43 U.S.L.W. at 4311 n. 7, the majority distinguished these cases, which resulted in mistrials, from a case which concluded in a defendant's favor. As Point I, ante, demonstrates, the facts in this case do not warrant a

finding that the first trial necessarily resolved the issue of simple abduction in petitioner's favor. A mistrial was properly declared as to simple abduction and abduction plus death. In any event, there is precedent for balancing the interests involved even if the prior trial has resulted in neither an acquittal nor a mistrial on the contested issue. United States ex rel. Jackson v. Follette, supra. The petitioner in Jackson was not acquitted of the contested charge at his first trial, nor was there a mistrial on that count; the jury, pursuant to the judge's instructions, remained silent. This Court found it appropriate to apply a balancing test between the competing interests of the public and the petitioner. Id. at 1049-1050.

Petitioner does not claim that there was any manipulation by the prosecution; that there was undue delay in his reprosecution; or that the prosecution had an opportunity to strengthen its case.* See Illinois v. Sommerville, supra at 469; Downum v. United States, 372 U.S. 734 (1963); United States ex rel. Jackson v. Follette, supra, at 1049. While it is true, as the majority pointed out, that the District Attorney did not seek to correct the trial court's instructions, petitioner had an "equal opportunity" to do so. United States ex rel. Jackson v. Follette, supra at 1049. When specifically questioned at the

*In his District Court Memorandum (at 5), petitioner conceded that his conviction at retrial was based on "substantially the same evidence" as presented at the first trial.

end of the charge, petitioner's counsel, whose competency has never been questioned, stated that he had no exceptions or requests. Nor did he object to acceptance of the verdict as rendered, or the granting of a mistrial and restoration of count four to the trial calendar.

While it is not argued that these failures amounted to consent to a retrial, petitioner, like the petitioner in Jackson, allowed the case to go to the jury without objection to the charge, and he also failed to object to the verdict as rendered and to the mistrial. Moreover, while he raised the collateral estoppel issue before his retrial, it was conspicuously absent from his briefs on direct appeal. United States ex rel. Rogers v. LaVallee, 463 F. 2d at 187. Cf. United States ex rel. Molinas v. Mancusi, 370 F. 2d 601, 602 (2d Cir.), cert. den. 386 U.S. 984 (1967).

In light of the above mentioned considerations and the inconsistency of the majority holding with prior decisions of this Court, respondent respectfully requests that this case be heard by this Court en banc.

CONCLUSION

WHEREFORE, IT IS RESPECTFULLY REQUESTED THAT THIS COURT GRANT RESPONDENT'S PETITION FOR A RE-HEARING EN BANC

Dated: New York, New York
May 29, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MARGERY EVANS REIFLER
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGELA FIORE , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 29th day of May , 1975, she served the annexed two copies upon the following named person :

Lois Goodman, Esq.
2948 Macomb St., N.W.
Washington, D.C. 20008

Joel Barrett, Esq.
Director, Prisoners' Rights Project
Syracuse College of Law
721 Ostrom Avenue
Syracuse, NY 13210

Attorneys in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Angela Fiore

Sworn to before me this
29th day of May , 1975

Margaret Evans Reidles
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MARIA L MARCUS
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May 29, 1975

Re: U.S. ex rel. Rogers
v. LaVallee, 74-2361

Hon. A. Daniel Fusaro
Clerk
United States Court of Appeals
United States Courthouse
Foley Square
New York, NY 10007

Dear Mr. Fusaro:

I am representing the appellee in the above-captioned case and enclose twenty-five copies of his petition for a rehearing en banc.

Appellant's assigned counsel on appeal was Lois Goodman, Syracuse College of Law Prisoners' Rights Project. Ms. Goodman is no longer with the Project and there seems to be some confusion about who now represents appellant, Ms. Goodman or the Project. Accordingly, I have served both parties with the petition.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By
Margery Evans Reifler
MARGERY EVANS REIFLER
Assistant Attorney General

MER:af
Encl.
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